parties were so discharged (in this Act referred to as 'the time of discharge') shall, in the case of sums so paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid, and, in the case of sums so payable, cease to be payable:

Even if I were wrong in holding that the Law Reform (Frustrated Contracts) Act, 1943, is a statute of general application, the plaintiff is still entitled to be repaid the monies advanced by him. In the case of *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.*[2] a contract for the sale and purchase of machinery was frustrated by the happening and continuation of the 1939 — 1945 war. It was held that £1,000 paid by the buyers to the sellers at the time of their making the order for the machinery must be returned to them, on the ground that there had been a complete failure of consideration. The headnote summarises correctly, I consider, the basic reasoning of the various learned judgments delivered, and I now quote a part of it:

"The claim of a party who has paid money under a contract, to recover it on the ground that the consideration for which he paid it has wholly failed is not based on any provision in the contract, but arises because in the circumstances the law gives a remedy in quasi-contract to the party who has not got what he bargained for. Although, in the formation of a contract, a promise to do a thing may be the consideration, in dealing with the law of failure of consideration and the right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but its performance."

In that case the contract was frustrated by, became impossible to perform because of a supervening, unforeseen event, whereas in the instant case the contract became impossible to perform because of an event foreseen as possible; but I do not see that that alters the principle concerned, and there was here a complete failure of consideration in the sense given to those words in the quotation just made, and the plaintiff is entitled to be returned the monies paid out by him to the defendant as money had and received by the defendant to the use of the plaintiff.

The plaintiff is only entitled to the return of the $1,000 at the time of the signing of the agreement and such amount as the court holds he advanced to the defendant under and because of the agreement between them. He cannot recover the amounts expended by him, or for which he is liable, for the hire of rails and locomotives, etcetera (and in any case the fact that he did expend, or is liable for, such amounts was not satisfactorily proved) or for transport charges, or for loss of wages, or for loss of profits.

Now, I accept the account book put in by the plaintiff as genuine, as true and correct and showing payments out actually made. The question is how many of the various amounts shown in the account book to have been expended can be said to have been paid to, and received by, the defendant.

All the items in his name are certainly chargeable to him, but I cannot see that anything else is; I cannot say that sums paid to Anbaleng or to Bunkabang or for the hire of speedboat for the plaintiff's own use (as gathered from his evidence) are sums paid to the defendant for the use of plaintiff. I accordingly rule that only the amounts shown by the account book to have been paid to the defendant himself are recoverable from him. The total of these amounts is $2,585.10.

The plaintiff is entitled therefore in my judgment to recover $1,000 plus $2,585.10, a total of $3,585.10, and to nothing else, and I accordingly give judgment in favour of the plaintiff against the defendant in the sum of $3,585.10.

In the circumstances I think it fair to fix now a sum for costs; I do not consider the plaintiff is entitled to his full taxed costs. I fix costs at the sum of $350 from which I subtract the $10 awarded to the defendant on the 16th of February 1965 in respect of costs of an adjournment, and order the defendant to pay $340 in costs to the plaintiff.

Judgment for the plaintiff.

LIM WAN HOOI v. ISMAIL BIN HASSAN

[O.C.J. (Hashim J.) March 24, 1965]

[Kuantan — Civil Suit No. 23 of 1963]

Practice and Procedure — Application to have writ renewed — Application made after expiry of writ and after claim barred by limitation — Civil Law Ordinance, 1956, s. 7(5).

In this case the plaintiff applied for an order that a writ be renewed. The action was for damages arising out of the death of one Wong Yang Cheong on May 5, 1961. The writ was filed on November 9, 1963. In October 1964 the plaintiffs applied for substituted service. The hearing of this application was fixed for November 23, 1964 when it was granted.

Held: as the application was made after expiration of twelve months from the date of the writ and as the claim had become barred by limitation, the application must be refused.

CIVIL SUIT.

H. L. Wrigglesworth for the plaintiff.

N. Ramachandran for the defendant.

Cur. Adv. Vult.

Hashim J.: There are two applications in this matter. One is by the defendant for an order that the writ be set aside under Order 8 rule 1 and the other application is by the plaintiff for an order that the writ be renewed for a period of 6 months also under Order 8 rule 1.

The following facts are not disputed:—

(1) One Wong Yang Cheong died on 5th May, 1961 as a result of an accident between deceased's car and the car driven by the defendant.

(2) On 9th November, 1963 deceased's widow as administratrix of his estate filed a civil suit in the High Court at Kuantan claiming damages. The solicitors for plaintiff were and still are Messrs. Wrigglesworth & Co. There is a note on the writ of summons which reads as follows:— "N.B. This writ is to be served within twelve months from the date thereof, or, if renewed, within six months from the date of last renewal, including the day of such date, and not afterwards."

(3) From the record it would appear that the solicitors for defendant were Messrs. Morris Edgar & Co.

(4) On 20th November, 1963 plaintiff's solicitors wrote to the Asst. Registrar, High Court, Kuantan.

(5) On 4th December, 1963 the Asst. Registrar wrote to plaintiff's solicitors stating that Messrs. Morris Edgar & Co. stated that they had received no instructions to accept service.

(6) On 8th December, 1963 plaintiff's solicitors wrote to the Asst. Registrar requesting him to serve the writ on the defendant in person giving defendant's address as Batu 3, Bagan Pinang, Port Dickson, Negri Sembilan.

(7) On 11th December, 1963 the Asst. Registrar forwarded the writ to the magistrate, Port Dickson with the request to serve the writ on the defendant at the address given by plaintiff's solicitors. The plaintiff's solicitors were informed of the action taken by the Asst. Registrar in his letter to the solicitors dated 2nd January, 1964.

(8) On 14th January, 1964 the Asst. Registrar wrote to plaintiff's solicitors informing them that according to the report of the process-server the defendant could not be found at the address given by the solicitors.

(9) On 9th February, 1964 plaintiff's solicitors wrote to the Asst. Registrar requesting him to make another attempt to serve the writ on the defendant and suggested that one Mr. Bakan Singh of Messrs. Shearn Delamore & Co., advocates and solicitors, Seremban would assist the process-server to locate the defendant.

(10) On 24th February, 1964 Mr. Bakan Singh wrote to the Asst. Registrar that he, Mr. Bakan Singh had gone to a house in Port Dickson and there met a lady who said she was the wife of defendant but that the defendant was not at home and therefore the writ could not be served.

(11) From the record it would appear that plaintiff's solicitors corresponded directly with the magistrate, Port Dickson in July, 1964 requesting the magistrate to have the writ served on the defendant.

(12) On 7th October, 1964 plaintiff's solicitors wrote to the Asst. Registrar enclosing three copies of an *ex-parte* summons in chambers for an application for substituted service.

(13) On 27th October, 1964 the Asst. Registrar wrote to plaintiff's solicitors informing them that their application was fixed for hearing on 23rd November, 1964.

(14) On 25th November, 1964 the order of substituted service was made.

Mr. Ramachandran for the defendant argued that the writ ceased to be in force by 20th November, 1964. Mr. Ramachandran contended that plaintiff took out a summons for substituted service on 27th October, 1964 and the order was made on 25th November, 1964. The last date of posting was 31st December, 1964. He further contended that the writ expired at the end of the period of one year. He cited numerous English authorities to support this contention. He also contended that by the time the writ was served by substituted service not only the writ had expired under Order 8 rule 1 but limitation had set in under section 7 of the Civil Law Ordinance. May I at this stage compliment Mr. Ramachandran on his presentation of his case. It was concise, coherent and cogent.

Mr. Wrigglesworth in support of his application for a renewal of the writ contended that as the Asst. Registrar had made the order for substituted service everything was in order. If I understood him correctly his contention was that the learned Asst. Registrar had the provisions of Order 8 rule 1 in mind when he made the order for substituted service. I am unable to accept this view. With great respect, I think it is the paramount duty of solicitors to protect the interests of their clients. It is not incumbent on the court to suggest to solicitors what should be done. The duty of the court is to entertain any application which is filed in court and to give an order on the application. The aggrieved party can always appeal against this order. Plaintiff's solicitors received in October, 1964 a letter from the Asst. Registrar stating that their application for substituted service would be heard on 23rd November, 1964. They would then realise that the day of hearing of the application would be on a day *after* the expiration of the one year period. They should have taken immediate steps to protect their clients' interests

by filing an application for the renewal of the writ under Order 8 rule 1.

I would only refer to a passage in *The Annual Practice* 1957 at page 60 which reads:— "Although the court has power to enlarge the time under O. 64 r. 7 the practice is not to do so after the expiration of twelve months from the date of the writ, or of six months from the date of last renewal, where, but for such enlargement of time, the plaintiff's claim would be barred." The deceased died on 5th May, 1961. By the time the writ was served by substituted service on or after 25th November, 1964, the period of three years had elapsed — see section 7(5) of the Civil Law Ordinance, 1956.

I therefore order that the application of defendant be granted and the application of the plaintiff be refused. Costs for defendant.

Order accordingly.

Solicitors: *Wrigglesworth & Co.; N. Ramachandran.*

THEN THAW EN & ANOR. v. WONG JUAT ENG

[A.C.J. (Harley J.) April 2, 1965]

[Kuching — Civil Appeal No. K 2 of 1965]

Landlord and Tenant — Subletting — Whether person given occupation of premises a subtenant or a mere licensee — Rent Control Ordinance (Cap. 86), s. 15(1)(b) & (j).

The appellant had applied for possession of premises from the respondent on the ground that there was a breach of the term not to assign or sublet and also that the respondent had received a sum by way of rent from a subtenant which sum exceeded in the aggregate 75% of the rent paid by the lessee. The respondent did in fact receive $300 per month from a person who occupied the ground floor of the demised premises. She contended however that there was no subtenancy given but a mere license.

Held: in the absence of a holding over or any special circumstances in this case, the respondent must be held to have sublet the premises and as there was no evidence of permission being given for such subletting, the appellant was entitled to possession of the premises.

Cases referred to:—

(1) *Addiscombe Estates Ltd.* v. *Crabbe* [1957] 3 All E.R. 563 at p. 570.

(2) *Dealex Properties* v. *Brooks, The Times,* March 2, 1965.

(3) *Marcroft Wagons* v. *Smith* [1951] 2 K.B. 496.

(4) *Errington* v. *Errington* [1952] 1 K.B. 290.

(5) *Murray Bull & Co.* v. *Murray* [1953] 1 Q.B. 211.

(6) *Kew Man* v. *Cheah Yee Eng* [1963] M.L.J. 140.

(7) *British & Malayan Trustees Ltd.* v. *Happy World Ltd.* [1963] M.L.J. 380.

(8) *Ministry of Agriculture & Fisheries* v. *Matthews* [1950] 1 K.B. 148.

MAGISTRATE'S CIVIL APPEAL.

T. O. Thomas for the appellants.

Respondent in person.

Cur. Adv. Vult.

Harley J.: The appellant is the landlord (by succession in title from a previous landlord) of certain premises subject to the Rent Control Ordinance Cap. 86, and respondent is his lessee. By the terms of a written registered lease, made with the previous landlord, the lessee pays $70 monthly by way of rent, and it was a term of the lease that the lessee should not assign or sublet the demised premises or any part thereof without the consent in writing of the landlord.

The landlord gave notice to quit and claimed possession of the premises from the lessee on the grounds that there was a breach of the term not to assign or sublet (section 15(1)(b) of Cap. 86), and also that the lessee received a sum by way of rent from a sub-tenant which sum exceeded in the aggregate 75% of the rent paid by the lessee (section 15(1)(j) of Cap. 86). It was undisputed that the lessee did in fact receive $300 per month from one Teng Boon King who occupied the ground floor of the demised premises.

The lessee (now respondent) denied that a sub-tenancy existed or that the $300 received was "rent". She contends that a mere licence was granted to one Teng Boon King by herself, and further that the previous landlord (one Liu Si Moi) had given verbal assent to her (the lessee) to grant a licence to any person to use the ground floor.

The main grounds of appeal are:—

(1) That the learned trial magistrate erred in taking into consideration parol evidence inconsistent with the written document contrary to his ruling that such evidence was not admissible.

(3) That Teng Boon King should have been held to be a tenant on the whole of the evidence and particularly because he was in exclusive possession of the ground floor of the premises paying $300 per month.

(5) That the learned magistrate misdirected himself in holding it unreasonable to make any order against the defendant for possession, reasonableness having been not in issue.

Paragraph 4(c) of the defence read as follows:—

> "There was no subletting as such of the premises at a rent in excess in aggregate of 75% of the rent paid by the defendant. The defendant did, in fact, have the permission of Liu Si Moi (the previous landlord) to grant licence and no limit or restrictions as to what amount of licence fee may be collected was imposed."

The learned magistrate ruled in relation to this point in the defence that evidence of the